

## **Employer Status Determination Escanaba Services, Inc.**

This is the decision of the Railroad Retirement Board regarding the status of Escanaba Services, Inc. (ESI), as an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts.

ESI is a sub-chapter S corporation which is privately held by one shareholder, Mr. Wade W. Larkin. It has three officers, Mr. Wade Larkin, Mr. John C. Larkin, and Ms. Avis K. Larkin. These three individuals also own the Escanaba & Lake Superior Railroad Company (Escanaba), a carrier employer under the Acts.

ESI was incorporated October 16, 1984, and began the leasing of railroad cars to Escanaba under contracts. According to Mr. Wade Larkin, ESI has no employees, and performs no services for any other company. ESI was formed to hold title to railcars used by Escanaba. Mr. Wade Larkin describes ESI as being a corporate shell established to protect against "ownership liability" on the part of others. Mr. Larkin states that this original purpose for ESI continues to be its purpose.

Section 1(a)(1) of the Railroad Retirement Act (RRA) (45 U.S.C. § 231(a)(1)), insofar as relevant here, defines a covered employer as:

(i) any express company, sleeping-car company, and carrier by railroad, subject to part I of the Interstate Commerce Act; [or]

(ii) any company which is directly or indirectly owned or controlled by, or under common control with one or more employers as defined in paragraph (i) of this subdivision and which operates any equipment or facility or performs any service (other than trucking service, casual service, and the casual operation of equipment and facilities) in connection with the transportation of passengers or property by railroad \*

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Section 1(a) and 1(b) of the Railroad Unemployment Insurance Act (RUIA) (45 U.S.C. §§ 351(a) and (b)) contain substantially similar definitions, as does section 3231 of the Railroad Retirement Tax Act (RRTA) (26 U.S.C. § 3231).

ESI is clearly not a carrier and, therefore, is not covered under section 1(a)(1)(i) of the Railroad Retirement Act. However, the

officers of ESI are the same individuals who own Escanaba; the owner of ESI has a substantial, if not controlling, interest in

Escanaba; and, in any case, ESI is not treated as an enterprise separate and independent of Escanaba. The Board has held railcar leasing to be a service in connection with rail transportation.

See Board Coverage Decision 94-50 regarding Northern Rail Car Leasing, Inc.; and Cf. 20 CFR 202.7 and Livingston Rebuild Center v. Railroad Retirement Board, 970 F. 2d 295 (7th Cir. 1992). Therefore, ESI is both under common control with a rail carrier and performing services in connection with railroad transportation. Accordingly, it is the determination of a majority of the Board that ESI is and has been a covered employer under the Acts from the date of its incorporation, October 16, 1984.

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Glen L. Bower

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V. M. Speakman, Jr.

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Jerome F. Kever (*Dissenting*)

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